(2)

Supreme Court, U.S.
FILED
JUL 31 1997
CLERK

No. 97-0028

In The

Supreme Court of the United States

October Term, 1996

RICHARD GLANTON, Individually and as a Trustee of The Barnes Foundation; NIARA SUDARKASA, Individually and as a Trustee of The Barnes Foundation; SHIRLEY A. JACKSON, Individually and as a Trustee of The Barnes Foundation,

Petitioners,

vs.

KENNETH E. DAVIS; JAMES S. ETTELSON; ALAN C. KESSLER; FRANK LUTZ; JOSEPH M. MANKO; ORA R. PIERCE; JAMES J. PRENDERGAST; BRIAN D. ROSENTHAL; DAVID A. SONENSHEIN; HOWARD L. WEST; GLORIA P. WOLEK; PHYLLIS L. ZEMBLE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

PAUL R. ROSEN
Counsel of Record
LARRY R. WOOD, JR.
SPECTOR GADON & ROSEN, P.C.
1635 Market Street, 7th Floor
Philadelphia, PA 19103
(215) 241-8800

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

52 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals properly affirmed an Order of the District Court remanding a purely state law based complaint for defamation, libel and slander, based upon a conclusion that removing defendants (Petitioners herein) did not establish the narrow and well-defined requirements for removal pursuant to 28 U.S.C. § 1443 under this Court's holdings in *Georgia v. Rachel*, 384 U.S. 780 (1966) and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966) (decided the same day), and in *Johnson v. Mississippi*, 421 U.S. 213 (1975)?

2. Whether the Ku Klux Klan Act, 42 U.S.C. § 1985(3), trumps state court defamation actions against African-Americans, and otherwise creates federal removal jurisdiction under 28 U.S.C. § 1443 for every state law based tort action brought against a minority defendant?

3. Whether, pursuant to 28 U.S.C. § 1447(d), the Third Circuit Court of Appeals properly dismissed an appeal from an Order of the District Court remanding a purely state law based complaint for defamation, libel and slander in which the District Court concluded that pursuant to 28 U.S.C. § 1441 no federal subject matter jurisdiction existed over the purely state court complaint as set forth in this Court's decision in *Franchise Tax Board of the State of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983)?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

COUNTER CITATION TO OFFICIAL AND UNOFFICIAL OPINIONS AND ORDERS ENTERED BELOW 1

COUNTER STATEMENT OF THE CASE AND THE FACTS 1

REASONS FOR DENYING THE WRIT 13

I. THE ORDER ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING THE DISTRICT COURT'S REMAND OF PETITIONERS' REMOVAL UNDER 28 U.S.C. § 1443 IS NOT IN CONFLICT WITH DECISIONS FROM THIS COURT OR WITH DECISIONS FROM OTHER COURTS OF APPEALS, AND FURTHER, DOES NOT CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER 13

II. THE OPINION OF THE THIRD CIRCUIT COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HERETOFORE HAS NOT BEEN RESOLVED BY THIS COURT; INSTEAD, THIS COURT SETTLED THE QUESTION OF FEDERAL LAW RAISED BY PETITIONERS IN *GEORGIA V. RACHEL*, 384 U.S. 780 (1966) AND IN *CITY OF GREENWOOD V. PEACOCK*, 384 U.S. 808 (1966), AND REAFFIRMED THOSE HOLDINGS IN *JOHNSON V. MISSISSIPPI*, 421 U.S. 213 (1975) 19

TABLE OF CONTENTS – Continued

Page

III. NO CONFLICT RELATING TO THE APPEALABILITY OF REMAND ORDERS EXISTS AMONG THE VARIOUS CIRCUIT COURTS OF APPEALS; THUS, CERTIORARI IS NOT NECESSARY IN THIS ACTION..... 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

City of Greenwood v. Peacock, 384 U.S. 808 (1966) ....*passim*

Conrad v. Robinson, 871 F.2d 612 (6th Cir. 1989) 13, 14, 15, 16

Davis v. Glanton, 107 F.3d 1044 (3d Cir. 1997) 7, 18, 24, 28, 29

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)..... 29

Georgia v. Rachel, 483 U.S. 780 (1966)..... *passim*

Hamm v. City of Rock Hill, 379 U.S. 306 (1964)..... 22

Hatchard v. Westinghouse Broadcasting, Co., 516 Pa. 184, 532 A.2d 346 (1987)..... 16

Herbert v. Lando, 441 U.S. 153 (1979) 21

Johnson v. Mississippi, 421 U.S. 213 (1975)..... 18, 19, 24

MacElree v. Philadelphia Newspapers, Inc., 544 Pa. 117, 674 A.2d 1050, *reh'g denied*, No. 11 E.D. Appeal Dkt. 1995, 1996 Pa. LEXIS 1243 (June 11 1996)..... 3, 7, 8

New York Times v. Sullivan, 376 U.S. 254 (1964)... 5, 20, 21

Quackenbush v. Allstate Ins. Co., 116 S.Ct. 1712 (1996) 27

Sofarelli v. Pinellas County, 931 F.2d 718 (11th Cir. 1991)..... 16

Thermatron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 26, 27

Whatley v. City of Vidalia, 399 F.2d 521 (5th Cir. 1968).....16, 17

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 14.1, Rule 10 .....3, 19

28 U.S.C. § 1441 28

28 U.S.C. § 1443 ..... *passim*

28 U.S.C. § 1651 28

42 Pa.C.S. § 5523 7

42 U.S.C. § 1985(3) 1, 2, 4, 7, 18

COUNTER CITATION TO OFFICIAL AND UNOFFICIAL OPINIONS AND ORDERS ENTERED BELOW

The instant Petition for Writ of Certiorari seeks review of an opinion of the United States Court of Appeals for the Third Circuit, *reported* at 107 F.3d 1044 (3d Cir. 1997). In an unpublished Order, dated April 1, 1997, the Third Circuit Court of Appeals, *en banc*, denied rehearing. (*See* Order, attached hereto as Appendix A.) The Order of the United States District Court for the Eastern District of Pennsylvania granting remand (the Order from which the appeal was initially taken) is *reported* at 921 F.Supp. 1421 (E.D.Pa. 1996).

COUNTER STATEMENT OF THE CASE AND THE FACTS

Essentially, Petitioners in this action are asking this Court to use the Ku Klux Klan Act, 42 U.S.C. § 1985(3), to create an immunity from state court tort actions for every African-American (and presumably every minority) charged with defamation in a state court complaint. For centuries-long, however, defamation actions have been tried in the courts of the various states without regard to the minority-status of the alleged defamer. Certainly, under this Court's well established precedent, a state court defendant cannot establish that he or she will be "denied or cannot enforce" rights in the state court proceeding just because he or she is African-American.

Following Petitioners' request through to its logical conclusion, every tort action filed in any state against a minority defendant would be removed to the federal

courts, contrary to the explicit language of this Court's holding in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966) that 28 U.S.C. § 1443 "does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial."[1] *Id.* at 828. Federal removal jurisdiction pursuant to Section 1443 cannot be premised upon such a ridiculous and tortured interpretation of Section 1985(3).[2] As set forth herein, Petitioners have failed to establish any of the reasons set forth in the rules of this Court for which certiorari may be granted, and as such, the instant petition for writ of certiorari should be denied.

Notwithstanding the myriad misrepresentations of law and fact contained in Petitioners' Petition, and further, notwithstanding the continuous references to some nebulous "new equilibrium in civil rights jurisprudence"

---

[1] Indeed, Petitioner-defendants have admitted that they could be successful in the state court. (*See* Petitioner-defendants' opposition to Plaintiffs' remand motion, at page 5).

[2] As Respondent-plaintiffs indicated to the District Court in their motion for remand, the frivolousness of Petitioner-defendants' removal argument can be examined in the following example. If two and one-half months prior to the filing of the Barnes Foundation's civil rights suit (the Barnes Foundation is not a party to the underlying state court tort action), Petitioner Glanton confronted one of the Respondents on the street and during that confrontation, called the Respondent a "racist" and slapped him or her across the face, the Petitioners' position would be that any state law cause of action for intentional tort arising out of Petitioner Glanton's conduct would be extinguished from state court review by reason of a later filed civil rights suit claiming a violation of Section 1985(3). Such a position is not sanctioned by, nor permitted by, Section 1985(3).

spun throughout Petitioners' entire Petition in an obvious attempt to distract this Court's attention, it is evident that the underlying, improperly removed action is a straightforward state court action for defamation, libel and slander based upon a scheme to portray in public newspapers and in news releases that the state court plaintiffs' conduct constituted dishonesty in public office through a hidden agenda of racism – a cause of action specifically permitted by Pennsylvania law in *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 674 A.2d 1050, *reh'g denied*, No. 11 E.D. Appeal Dkt. 1995, 1996 Pa. LEXIS 1243 (June 11 1996). The underlying action was instituted by several individual residents of the Township of Lower Merion (hereinafter "Respondents" or "Plaintiffs"), who, at the time of the tortiously defamatory conduct complained of, also served as commissioners of the Township of Lower Merion (hereinafter the "state court defamation action").[3] Petitioners' instant petition fails to establish any of the reasons set forth in Supreme Court Rule 10, for which petitions for writ of certiorari may be granted.

After having failed before the District Court and before the Third Circuit Court of Appeals in their attempts to escape liability for their intentionally tortious

---

[3] Unlike as suggested by Petitioners (page 1 of their petition), out of the fourteen (14) Commissioners who currently comprise the township's board of commissioners, only eleven (11) are plaintiffs in the underlying state court defamation action. Moreover, even though Petitioners refuse to cite to entire sentences from Respondents' complaint (obviously in an attempt to misstate the facts), Respondents' complaint plainly identifies the Respondent-plaintiffs as individual residents of the Township of Lower Merion. *See* Complaint at ¶¶ 1 and 4.

conduct, Petitioners are now hoping to persuade this Court that federal law somehow "immunizes" them from state court civil actions for defamation, libel and slander simply because they are African-Americans. That position is clearly inconsistent with established defamation jurisprudence, for it is unmistakable that defamation laws exist without regard to the "status" of the speaker, *i.e.*, defamation is color-blind. Further, and as noted by the Third Circuit, no federal statutes, inclusive of 42 U.S.C. § 1985(3), grant immunity from state civil actions brought to seek redress for defamatory statements.[4] No matter

---

[4] Petitioners' petition is rife with misstatements and mischaracterizations of fact and law. Respondents have attempted to address throughout this opposition (consistent with Supreme Court Rule 15.2) all of those misstatements even though it is evident that none of the allegations contained in the instant petition for writ of certiorari have any bearing upon whether Petitioners' initial removal on March 7, 1996, was jurisdictionally proper. For instance, and as an example of the nonsense which comprises the instant petition, at page 8 of their petition, Petitioners attempt to support their request by claiming that references to Petitioner Glanton during depositions as "Richard" are indicative of civil rights violations:

> In addition to these vast exploratory excursions, [Respondents] have continually referred to petitioner trustee Glanton on the record of his and the other petitioner trustees depositions as "Richard" over continued objections. Remonstrances to counsel to avoid such characterizations as resonant of historical intentional diminutives as a badge of inferiority were disregarded.

Nevertheless, it was Petitioner Glanton, himself, who asked Respondents' counsel to call him "Richard": "In this deposition, Mr. Rosen, refer to me as Mr. Glanton or Richard, as you prefer – it doesn't matter. . . . " (*See* Excerpts from July 3, 1996 deposition

how many times Petitioners' attempt to improperly label the state court defamation action as retaliatory (a claim which is presently pending in a Section 1983 action brought by the Barnes Foundation), their repeated references to civil rights laws and to the alleged "new equilibrium in civil rights jurisprudence" do not change the simple, controlling fact that Petitioner Glanton, in conspiracy with the other Petitioners, made the statements complained of, and, if all of the elements of the state defamation claim are proved at trial, consistent with this Court's opinion in *New York Times v. Sullivan*, 376 U.S. 254 (1964), Plaintiffs will establish that Petitioner-defendants ***defamed them – starting in November of 1995.***

Plaintiffs' complaint alleges that on November 27, 1995, in an article published in the *Philadelphia Inquirer*, Richard H. Glanton, as part of a "smear campaign," and in conspiracy with, and with the encouragement of Dr. Niara Sudarkasa, Dr. Shirley A. Jackson and Charles Frank,[5] "maliciously and knowingly and with wanton and careless disregard of the consequences of his conduct and the harm it would inflict, accused the plaintiffs of dishonesty in carrying out their civic duties in response to the parking, traffic and safety issues of the residents as nothing more than 'thin[ly] disguised racism' for their failure to comply with his demands and asserted that 'There is no way you cannot see racism in the way they

---

of Richard H. Glanton, at pages 157-158, attached hereto as Appendix B.)

[5] After discovery, a voluntary notice of dismissal, without prejudice, was approved by the court, dismissing Defendant Charles Frank on August 29, 1996.

are treating the Barnes Foundation.' " (Complaint, at ¶ 44).[6]

Consequently, the state court defamation action, filed only approximately three (3) months after the tortious

---

[6] Contrary to Petitioners' "characterization" of Respondents' complaint (page 2 of their petition), Respondents' state court complaint does not seek damages for any allegations contained in the Barnes Foundation's federal civil rights complaint, which was filed on January 18, 1996, almost two (2) months after the defamatory statements were published by Mr. Glanton in November of 1995. Instead, Respondents alleged in their state court complaint that Petitioner-defendants' malicious motives were further extant by the "filing of the [Barnes's] federal lawsuit, and thereafter, delivering it immediately to the press, deliberately delaying service and notice to Plaintiffs. . . . " (Complaint, at ¶ 48). Moreover, even though Petitioners deny that Petitioner Glanton made the defamatory statements about Respondents – but simultaneously alternatively claim that if a jury were to "properly determine that the alleged defamation referred to the plaintiffs, which is denied, said statements, referring to thinly disguised racism, and racism, is and was true," (New Matter, at ¶ 9) – Petitioners oddly never joined the newspaper that published Petitioners' defamatory statements as a third party defendant.

Tellingly, however, a reporter for another newspaper, the *Main Line Times*, was deposed as part of Plaintiffs' claim of a "smear campaign" in November of 1995. That newspaper published almost identical defamatory statements made by Petitioner Glanton on November 23, 1997 only four (4) days prior to the November 27, 1995 *Philadelphia Inquirer* article ("Meanwhile, Glanton said the resolution passed by the Lower Merion board of commissioners at last Wednesday's business meeting was about racism, not public safety, illegal parking, crowded streets, or traffic jams"). Reporter Yanofsky testified that Petitioner Glanton made those statements to her about Respondents. (*See* Excerpts from January 16, 1997 deposition of Beth Yanofsky, at pages 13-14, attached hereto as Appendix C.)

conduct occurred, was filed well within the one (1) year statute of limitations specifically set forth in Pennsylvania law, 42 Pa.C.S. § 5523. Immediately, thereafter, on March 7, 1997, Petitioners improperly removed the state court defamation action to the United States District Court for the Eastern District of Pennsylvania.

Upon Respondents' motion for remand, the District Court, after full briefing and oral argument, held that Petitioners had completely failed to establish that federal removal jurisdiction existed at the time Petitioners filed their "notice of removal." As a result, the District Court remanded the Respondents' purely state law claims to the Montgomery County Court of Common Pleas pursuant to this Court's holding in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966).

The United States Court of Appeals for the Third Circuit affirmed that remand order concluding that Petitioners had indeed failed to satisfy the narrow and well-defined requirements for removal under Section 1443, and held that "it is clear that nothing in § 1985(3) or in *Griffin* immunizes the Trustees from civil state court defamation actions." *Davis v. Glanton*, 107 F.3d 1044, 1051 (3d Cir. 1997). On April 1, 1997, the Third Circuit Court of Appeals denied Petitioners' request for rehearing en banc. Now, as part of their "petition," Petitioners complain about the Third Circuit's opinion, as follows:

> The Court did not address the effect of the state law of *MacElree*,[7] making the phrase "racism"

---

[7] *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 674 A.2d 1050, *reh'g denied*, No. 11 E.D. Appeal Dkt. 1995, 1996 Pa. LEXIS 1243 (June 11 1996).

> actionable, as impeding the ability to protect equal civil rights in the state court.

(Petitioners' petition, at pages 4-5.)

The Pennsylvania Supreme Court in *MacElree*, however, did not simply "make[ ] the phrase 'racism' actionable." Instead, applying well established Pennsylvania law to an appeal of an order granting preliminary objections, the Pennsylvania Supreme Court noted that if a statement accuses or permits an inference that a public official is engaging in dishonesty in office through a hidden agenda of racism – abusing the power of his elected position in order "to further racism and his own political aspirations" – such an accusation constitutes a charge of misconduct in office, and as a result, fits within the category of defamation per se. *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 125, 647 A.2d 1050, 1054 (1996).

Epitomizing the lack of merit to Petitioners' instant Petition for Writ of Certiorari, as well as to Petitioners' improper removal, there is, and was, absolutely no reason for the Third Circuit to address the Pennsylvania Supreme Court's opinion in *MacElree*. Even if Petitioners believe that *MacElree* is not sound jurisprudence, removal in this action is not the proper method by which to test the *MacElree* decision. Instead, as noted by this Court on numerous occasions, including in *City of Greenwood v. Peacock*, numerous methods exist by which a litigant may seek to vindicate perceived violations of federal rights in state court – one of those being direct review to this Court following an unfavorable verdict if the claims have not been vindicated by the trial or appellate courts of the state. *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966).

Therefore, Petitioners' complaints are completely unsupported and without merit, and as such, having failed to establish any of the reasons for which certiorari may be granted, this Court should deny the instant petition.

Petitioners also attempt to support their petition by again referring repeatedly to statements which Respondents' counsel purportedly made in the press that the purpose of the state court defamation action was intended to pain and stop Petitioners from discussing racism. (Petitioners' petition, at page 3). Notwithstanding these intentionally misleading "soundbites," Respondents quoted the newspaper article referred to by Petitioners in their brief filed before the Third Circuit.[8] A review of the article, therefore, plainly reveals that Respondents' counsel was discussing the punitive damages aspect of relief requested in Plaintiffs' state court defamation action – to stop Petitioner Glanton from intentionally defaming any and all individuals by playing

---

[8] The text of the article reads as follows:

> Asked what township officials hope to gain from the lawsuit, Philadelphia attorney Paul Rosen said, "To stop this man from his wanton and careless use of the race card."
>
> "We want to pain him and make him dig deep into his own pocket, so every time he wants to use the race card in the future, he'll think twice."
>
> "We'll accept whatever the jury decides the fee should be. They just want him to stop hurting people and they want their reputations clean. We want punitive damages that will come out of his personal pocket, not his insurance company," Rosen said.

(*See* Brief for appellees filed in the Third Circuit, at page 30.)

the race card against all who oppose him in any manner in order to obtain a personal and non-racial advantage.

Ironically, but, of course not disclosed to this Court by Petitioners, during a deposition held in this case on November 11, 1996, Petitioner Glanton admitted that a purpose of punitive damages is to "cause [financial] pain," and further, to cause a person committing intentionally tortious acts to dig deep into his or her own personal financial pockets to deter similar intentional tortious conduct in the future. Indeed, Petitioner Glanton testified:

MR. ROSEN: This is an article dated – it indicates Main Line Times, March 7, 1996. It says, "Asked what township officials hope to gain from the lawsuit, Philadelphia attorney Paul Rosen said, 'To stop this man from his wanton and careless use of the race card.' 'We want to pain him and make him dig deep into his own pocket so every time he wants to use race card in future, he'll think twice.' " Is that what you're talking about?

MR. GLANTON: That's part of what I'm talking about, basically this venal, mean sort of like let's sic the bloodhounds on this black guy.

MR. ROSEN: *Is this a racist comment?*

MR. GLANTON: *Oh, yes, definitely.*

MR. ROSEN: *I made a racist comment here?*

MR. GLANTON: *Yes.*

MR. ROSEN: According to this, I am a racist?

MR. GLANTON: Well, no, I didn't say that.

* * *

MR. ROSEN: Now, you understand the concept of punitive damages is to inflict damages upon somebody so that they feel [pain] and dig deep into their pockets so they don't do something again; isn't that correct?

MR. GLANTON: Yes.

(*See* Excerpts of November 7, 1996 deposition of Richard Glanton, at pages 815 – 822, attached hereto as Appendix D (emphasis supplied)).

Accordingly, a review of Petitioners' petition, excluding all of the misstatements of law and fact contained therein, demonstrates that Petitioners are keenly aware that they cannot establish the "denied or cannot enforce" requirement for removals under Section 1443 pursuant to this Court's opinions in *Georgia v. Rachel,* 384 U.S. 780 (1966) and *City of Greenwood v. Peacock,* and further, that none of the reasons set forth in Supreme Court Rule 10 for the grant of certiorari exist.

In an effort to overcome that deficiency, Petitioners instead piece intentional misrepresentations together with an overarching theme of some "new equilibrium in civil rights jurisprudence," desperately hoping to create a

smoke screen large enough to divert this Court's attention away from the real issues: (1) that they failed, and indeed cannot, establish that they will be denied or will not be able to enforce all of their rights in the courts of the State of Pennsylvania and (2) that the Third Circuit's opinion affirming the District Court's remand order was correct and consistent with prior decisions of this Court, as well as with decisions from the various circuit courts of appeals – confirming that no "conflict" between the circuits or with this Court exists.

Since the remand order was entered by the District Court, the state court defamation action has proceeded in the ordinary course in state court. The state court overruled all of the preliminary objections raised by Petitioners to Respondents' state court complaint. Furthermore, upon motion by Respondents, discovery was ordered to be completed on an expedited basis. Thus, discovery in the state court defamation action is now complete, and as such, the case is in the proper procedural posture to be scheduled for trial.

REASONS FOR DENYING THE WRIT

I. THE ORDER ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING THE DISTRICT COURT'S REMAND OF PETITIONERS' REMOVAL UNDER 28 U.S.C. § 1443 IS NOT IN CONFLICT WITH DECISIONS FROM THIS COURT OR WITH DECISIONS FROM OTHER COURTS OF APPEALS, AND FURTHER, DOES NOT CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

In petitioning this Court for a Writ of Certiorari, Petitioners simply assert, but without any analysis, that the Third Circuit's holding in this matter conflicts with the decisions of other circuits. Notwithstanding that assertion obviously made in an attempt to fit within the narrow strictures of this Court's rules relating to writs of certiorari, a study of the cases cited by Petitioners, including a review of the Third Circuit's analysis of those same cases, discloses that no such alleged conflict among the various circuit courts of appeals exists.

To begin with, Petitioners claim that the Sixth Circuit Court of Appeals' decision in *Conrad v. Robinson*, 871 F.2d 612 (6th Cir. 1989) "conflicts" with the decision of the Third Circuit Court of Appeals in the instant action. However, even as recognized by the Third Circuit, the decision in Conrad addressed a completely different question, and thus, while providing absolutely no support for Petitioners' claims, the analysis employed in that case does not substantiate Petitioners' unfounded claim that a "conflict" among the various circuit courts of appeals exists.

In *Conrad v. Robinson*, Conrad filed a state court libel action against Robinson, claiming that certain statements which Robinson had made about Conrad in a Cleveland newspaper, the *Plain Dealer*, were libelous. Upon a review of Conrad's state court complaint, the court of appeals concluded that the ***only statements*** made by Robinson that were being objected to in Conrad's complaint were statements specifically relating to an ***earlier*** federal court complaint which Robinson had filed against AFL-CIO Local 496, of which Conrad was the business manager.

In deciding whether Robinson's removal to federal court was appropriate, the Sixth Circuit noted that for purposes of Section 1443, Title VII constituted a federal equal rights law. Addressing the well established "denied or cannot enforce" requirement particular to removals under Section 1443, and under the specific factual scenario of that case, the Sixth Circuit Court of Appeals concluded that since Conrad's state court libel action was ***only*** objecting to Robinson's statements in the newspaper reiterating allegations of his earlier-filed federal court lawsuit, the speech at issue – allegations repeated from his prior federal suit – was so closely related to the earlier filed lawsuit (an action expressly protected from retaliation under Title VII),[9] that removal under Section 1443 was justified under this Court's holding in *Georgia v. Rachel*, 483 U.S. 780 (1966). *Conrad v. Robinson*, 871 F.2d at 616.

Nevertheless, and supporting the Third Circuit's opinion in this matter, the Sixth Circuit acknowledged the

---

[9] No such federal statute prohibiting retaliation against, or providing immunity for, defamation exists in this case.

extremely limited application of its opinion, suggesting that "[h]ad Robinson's comments in the Plain Dealer been unrelated to his federal court case against Local 496, but were just general allegations that Conrad discriminated on the basis of race, the result might very well be different." *Id.*

Consequently, it is evident that *Conrad v. Robinson* is distinguishable from Petitioners' removal attempt on numerous grounds; thus, not providing any support for Petitioners' instant contention that a "split" among the various circuit courts of appeals exists. In *Conrad*, unlike Petitioners, Robinson relied upon a specific federal statute which explicitly prohibited any form of retaliation for the filing of employment discrimination charges.

Moreover, completely opposite to the factual situation in *Conrad*, Respondents' state court defamation action seeks damages for intentionally defamatory statements first made in November of 1995. When Petitioner Glanton first made the defamatory statements in November of 1995, they were communicated to reporters entirely independent of any activity – "protected" or otherwise – in which the Barnes Foundation (an entity completely separate from Petitioners) engaged two (2) months later. Indeed, neither law nor logic supports Petitioners' attempt to use the Barnes Foundation's subsequent filing of a civil rights action to extinguish, or otherwise trump, Respondents' clear right to seek relief in Pennsylvania state court for Petitioners' prior intentionally tortious

conduct purposefully designed to injure Respondents' fundamental constitutional right to reputation.[10]

Accordingly, and as acknowledged by the Third Circuit Court of Appeals, the opinion of the Sixth Circuit in *Conrad* is completely distinguishable from the removal issue raised by Petitioners in the instant action. Thus, it is evidence that the circuit courts of appeals are not in conflict with respect to application of this Court's well settled precedent relating to the rare instances of federal removal jurisdiction pursuant to 28 U.S.C. § 1443.

Petitioners' citation to *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991) and *Whatley v. City of Vidalia*, 399 F.2d 521 (5th Cir. 1968), similarly, do not reveal a "conflict" among the circuit courts of appeals. Instead, these opinions confirm that the instant petition is without merit, and further buttress the otherwise solid foundation of precedent upon which the Third Circuit's opinion in this matter is based.

In *Sofarelli*, an action was initiated in Florida state court against Sofarelli, seeking to prohibit Sofarelli from relocating a house. Sofarelli, removed the action to federal court, counterclaiming that the state court lawsuit was an effort to coerce, intimidate or otherwise deter him from providing housing, and thus, directly contrary to explicit prohibitory language of the federal Fair Housing Act requiring that no person shall coerce, intimidate, threaten or otherwise interfere with any other person

---

[10] *See Hatchard v. Westinghouse Broadcasting, Co.*, 516 Pa. 184, 194, 532 A.2d 346, 351 (1987) (under the Pennsylvania Constitution, reputation is considered to be a fundamental right equal in importance to life, liberty and property).

who encourages the exercise of rights granted by that Act. Since the state action was designed to deter conduct which Sofarelli, by specific federal statute could participate in with impunity, the parties to the action did not dispute that the removal fit within the narrow confines of this Court's holding in *Georgia v. Rachel*, 384 U.S. 780 (1966).

Likewise, in *Whatley v. City of Vidalia*, 399 F.2d 521 (5th Cir. 1968), after certain individuals were arrested in September of 1966, the individuals arrested removed the prosecutions to federal court pursuant to Section 1443, claiming that they had been arrested for engaging in activity designed to encourage voter registration – activity for which Congress had specifically provided an immunity (*i.e.*, specifically substituted a right for conduct otherwise labeled criminal or tortious): "No person shall intimidate, threaten or coerce . . . any person for urging or aiding any person to vote or attempt to vote." *Id.* at 522 n.2 (citing 42 U.S.C. § 1973i(b)). As such, reversing the district court's remand order, the Fifth Circuit noted that since Congress had specifically immunized any and all activity undertaken to assist others to vote, under the "denied or cannot enforce" analysis long required by this Court, a prosecution based upon that identical immunized conduct would itself be an act by which the movant's civil rights would be violated. *Id.* at 526.

Thus, settled precedent from this Court, ***consistently applied by all of the circuit courts***, establishes that absent a "formal expression of state law" confirming that a state court defendant will be "denied or cannot enforce" federal rights in a state court proceeding, a state court defendant will not be able to remove an action from state court pursuant to Section 1443 unless the state court defendant

can point to a specific federal equal civil rights statute in which Congress immunized the specific conduct at issue – legislatively substituting a federal right to engage in certain conduct otherwise considered to be tortious or criminal under state law.

Affirming the District Court's order remanding this action to its state court forum, the Third Circuit Court of Appeals held as follows:

> A careful reading of § 1985(3) makes clear, however, that the provision grants no such protection. It does not confer an absolute right on private citizens to defame others. Nor does it confer immunity from state civil actions brought to seek redress for those statements. Furthermore, the Trustees do not attempt to demonstrate, and apparently cannot demonstrate, that a state law exists that would on its face deny them the ability to enforce their equal rights in state court.

Davis v. Glanton, 107 F.3d 1044, 1050 (3d Cir. 1997).

Accordingly, and without regard to Petitioners' representations – representations which are purposefully "skewed" by Petitioners in attempting to convince this Court to grant their Petition for Writ of Certiorari – an examination of all of the cases cited by Petitioners, positively illustrates that the Third Circuit's thoughtful and comprehensive opinion in this matter is consistent with the well established precedent set forth in this Court's trilogy of cases – *Georgia v. Rachel*, 384 U.S. 780 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966); and *Johnson v. Mississippi*, 421 U.S. 213 (1975) – as well as with the opinions of the various circuit courts of appeals that have addressed Section 1443 removals.

Therefore, since the United States Court of Appeals for the Third Circuit has not decided an important federal question in a way that conflicts with relevant decisions of this Court, and since the United States Court of Appeals for the Third Circuit has not entered a decision that is in conflict with the decision of another United States Court of Appeals on the same important matter, this Court should deny Petitioners' instant Petition for Writ of Certiorari.

II. THE OPINION OF THE THIRD CIRCUIT COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HERETOFORE HAS NOT BEEN RESOLVED BY THIS COURT; INSTEAD, THIS COURT SETTLED THE QUESTION OF FEDERAL LAW RAISED BY PETITIONERS IN *GEORGIA V. RACHEL*, 384 U.S. 780 (1966) AND IN *CITY OF GREENWOOD V. PEACOCK*, 384 U.S. 808 (1966), AND REAFFIRMED THOSE HOLDINGS IN *JOHNSON V. MISSISSIPPI*, 421 U.S. 213 (1975)

Without explanation or reasoning, and ostensibly to support their incoherent petition which does not comply with Supreme Court Rule 14.1, let alone Rule 10, Petitioners simply use the instant petition as yet another vehicle to "reargue" their improper removal: "Our nation is in the process of developing a new equilibrium of the values of fair treatment, federalism, and tolerance. The threat to this equilibrium of the distortion involved here is a clear one." Based on that so called "new equilibrium," Petitioners claim that the issue decided by the Third Circuit Court of Appeals – that the District Court's

order remanding Respondents' purely state law complaint for defamation, libel and slander to the Pennsylvania state court system – is so important as to require this Court to grant certiorari in order to exercise this Court's oversight responsibility.

To begin with, Petitioners continue to make much ado about a lawsuit filed by a separate entity – the Barnes Foundation – approximately two (2) months before Respondents filed the instant defamation action. Again, however, Petitioners neglect to point out, or otherwise consider, that the defamatory statements made by Petitioner Glanton were published almost two (2) months before the civil rights suit was filed. Moreover, contrary to Petitioners' representations, *i.e.*, that Respondents, in their state court complaint, are "proceeding against the federal civil rights plaintiff," (*see* Petitioners' petition, at page 19), it is obvious that Respondents are not proceeding against the Barnes Foundation – apparently this misstatement was purposefully interjected to bolster their false and unsupported claim that the state court defamation action is "retaliatory."

Petitioners additionally claim that if this Court denies their petition, that that denial will somehow conflict with this Court's holding in *New York Times v. Sullivan*, 376 U.S. 254 (1964). This contention is absurd, and not surprisingly, is neither explained by, nor substantiated by, Petitioners.

Apparently, Petitioners believe that this Court's decision in *New York Times v. Sullivan* provides them with a license to defame. Further evidencing the complete lack of merit to their petition, Petitioners are seemingly claiming that removal is required under Section 1443, and this

Court's decision in *Georgia v. Rachel*, 384 U.S. 780 (1966), since any state court lawsuit brought against them for defamation, libel and slander is an action which itself violates their constitutional rights. That position is expressly contrary to this Court's decision in *New York Times v. Sullivan*, and its progeny.

Notwithstanding their absurd contentions, it is well established that in adopting the *New York Times* standard for public official and public figure defamation cases, this Court, consistent with the rigors of the First Amendment, was simply making it more difficult for a plaintiff to obtain a defamation verdict. Contrary to Petitioners' suggestion, this Court's decision in *New York Times* did not, and was never intended to, "immunize" defamatory statements from review:

> [I]f the claimed inhibition [of speaking out] flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. "[T]here is no Constitutional value in false statements of fact."

Herbert v. Lando, 441 U.S. 153, 171 (1979) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

Accordingly, it is evident that Petitioners' instant Petition for Writ of Certiorari should be denied since the opinion of the Third Circuit Court of Appeals does not create an issue of extreme federal importance requiring this Court's review.

Furthermore, the Third Circuit's application of well established precedent relating to removals under Section 1443 illustrates that federal law on this subject is well settled, and was applied consistently and correctly by the Third Circuit Court of Appeals. Thus, there is no reason to grant Petitioners' Petition for Writ of Certiorari.

In *Georgia v. Rachel*, this Court acknowledged that under a long line of precedent, removal pursuant to 28 U.S.C. § 1443 is warranted "only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts." *Georgia v. Rachel*, 384 U.S. 780, 800 (1966). This Court noted the reason for this well established principle:

> It ensured that removal would be available only in cases where the predicted denial appeared with relative clarity prior to trial. It also ensured that the task of predication would not involve a detailed analysis by a federal judge of the likely disposition of particular federal claims by particular state courts. That task not only would have been difficult, but it also would have involved the unseemly process of prejudging their brethren of the state courts.

Id. at 803-804. However, in the narrow circumstances of that case, since Congress, as interpreted by this Court in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), had specifically substituted a right to engage in conduct which was otherwise labeled wrongful, *i.e.*, criminal, this Court concluded that any proceedings instituted against that conduct in state court would satisfy the "denied or cannot enforce" requirement of Section 1443 removal. *Id.* at 804.

Thereafter, in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), a case decided the same day, but importantly ***without a Congressional mandate to substitute a right for otherwise improper conduct,*** this Court, again applying long-standing precedent, opined that removal under Section 1443 was not proper:

> The present case differs from *Rachel* in two significant respects. First, no federal law confers an absolute right on private citizens – on civil rights advocates, on Negroes, or on anybody else – to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bit a policeman. Second, no federal law confers immunity from state prosecution on such charges.

Id. at 826-827 (footnote omitted). Moreover, this Court reaffirmed its past line of cases holding that removal under Section 1443 was only available in those rare cases where a clear prediction could be made on the basis of an explicit state law that the movant's federal rights would be violated in the state court proceeding. Under that standard, this Court recognized that the motives of the individuals bringing suit were of no moment:

> The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty [or libel] if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights.

Id. at 827-828.

Furthermore, and completely consistent with the Third Circuit's opinion in this matter,[11] this Court announced that it was not following century-old precedent solely resulting from its "blind adherence" to the principle of *stare decisis*, but, after thoughtful review, this Court concluded that its prior decisions were entirely correct: Section 1443 was not intended to "operate . . . a wholesale dislocation of the historic relationship between the state and the federal courts" in the administration and application of state law – whether tort law or criminal law. *Id.* at 831.

Ten (10) years later, in *Johnson v. Mississippi*, 421 U.S. 213 (1975), a case in which numerous individuals were arrested after engaging in picketing and encouraging the boycott of certain establishments which they believed were engaged in discrimination, this Court again denied removal under Section 1443, reaffirming its well settled and long standing precedent interpreting Section 1443 – the same precedent which the Third Circuit Court of Appeals relied upon in deciding to affirm the District Court's order remanding the instant matter to state court.

Clearly, as noted by the Third Circuit, no federal law confers an absolute right on private citizens – on civil rights advocates, on African-Americans, or on anybody else – to defame another individual. Moreover, no federal law confers immunity from state civil actions brought to

---

[11] The Third Circuit noted that the arguments made by Petitioners herein (Appellants below) in support of their appeal of the remand decision, "ignores the rigors of federalism, and the technical precepts of governing by dint of which the principles of federalism are translated into reality." *Davis v. Glanton*, 107 F.2d 1044, 1052 (3d Cir. 1997).

seek redress for defamation. Accordingly, it is evident that the law, as applied by the Third Circuit Court of Appeals, is well settled.

As noted earlier, since Petitioners cannot point to an explicit state law which satisfies the "denied or cannot enforce" prong of this Court's test for removal under Section 1443, and since Congress has not enacted a specific equal civil rights statute to immunize defamatory statements – *i.e.*, substituted a right to engage in defamation, conduct otherwise deemed tortious under state law – Petitioners cannot conjure-up federal removal jurisdiction under Section 1443. As this Court has noted on numerous occasions: "When [a defendant] has only an apprehension that such rights will be withheld from him when his case shall come to trial [in state court], he cannot affirm that they are actually denied, or that he cannot enforce them." *Georgia v. Rachel*, 384 U.S. 780, 799 (1966) (citing *Commonwealth of Virginia v. Rives*, 100 U.S. 303, 319-320 (1879)). Absent a predetermined unequivocal deprivation of federal rights in a state court proceeding, a remedy cannot be found in the removal statutes, but rather, as has been the case for over a century, if it turns out that federal rights do go without vindication before a state trial court or a state's appellate courts, vindication of those rights can be accomplished by direct review to this Court. *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966).

Thus, Petitioners have failed to demonstrate a need for this Court to exercise its supervisory powers, particularly since the decision of the Third Circuit has not departed from the accepted and usual course of judicial proceedings, and further, has not sanctioned such a departure by the District Court. Moreover, the question

decided by the Third Circuit – an opinion entirely consistent with past decisions of this Court – has been settled by this Court for at least three (3) decades. Petitioners' Petition for Writ of Certiorari should be denied.

III. NO CONFLICT RELATING TO THE APPEALABILITY OF REMAND ORDERS EXISTS AMONG THE VARIOUS CIRCUIT COURTS OF APPEALS; THUS, CERTIORARI IS NOT NECESSARY IN THIS ACTION

Ignoring all of the "posturing" contained in the instant petition as completely irrelevant to determining whether a writ of certiorari should be granted, Petitioners merely support their request for a writ of certiorari on the following declaration:

> Certiorari is needed to resolve a recurring and important conflict among the circuits on a matter of jurisdiction, a matter of special concern to this Court, as recognized *e.g.* in *Thermtron Products v. Hermansdorfer,* 423 U.S. 336 (1976).

(Petition for Writ of Certiorari, at page 21).

To support that alleged "conflict" among the various circuit courts, and thus, their petition for writ of certiorari, Petitioners cite to seven (7) cases (from the Second, Fourth, Fifth, Sixth and Eighth Circuits) which they admit support the Third Circuit's opinion, but thereafter, to create the illusion of a conflict, Petitioners cite to fifteen (15) cases (from the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits) which they claim have taken a "contrary approach."

Notwithstanding their machinations, a review of the cases cited by Petitioners reveals only one thing: The

jurisprudence relating to the appealability of remand orders is, as has been, well settled for quite some time.

Indeed, in *Georgia v. Rachel*, this Court recognized the long-standing precedent prohibiting "reveiw of a remand order 'on appeal or otherwise' in cases removed pursuant to any statute." *Georgia v. Rachel*, 384 U.S. 780, 786 n.6 (1966). This Court noted, however, that in 1964, Congress amended Section 901 of the Civil Rights Act, specifically permitting appeals from remand orders in cases initially removed under 42 U.S.C. § 1443. *Id.*

Ten (10) years later, this Court refined that otherwise long-standing precedent as follows: "[O]nly remand orders issued under § 1447(c) and invoking the grounds specified there – that removal was improvident and without jurisdiction – are immune from review under § 1447(d)." *Thermatron Products, Inc. v. Hermandorfer*, 423 U.S. 336, 346 (1976). In deciding that issue, however, this Court specifically indicated that it was neither disturbing nor taking issue with the otherwise well established prohibition of appeals contained in Section 1447(d). *Id.* at 351-352. Accordingly, if an order of remand is (1) based on lack of federal court subject matter jurisdiction or (2) based on defects in the removal procedure, an appeal from the order of remand is not permissible. *See Quackenbush v. Allstate Ins. Co.*, 116 S.Ct. 1712, 1718 (1996).

In an effort to circumvent this well settled jurisprudence, Petitioners, remarkably and utterly disingenuously, support their petition by declaring:

> The only § 1447(c) ground for remand which could be at issue herein is "lack of subject matter jurisdiction," but it was not explicitly asserted by the District Court. The District

> Court's determination to remand *was based on* the discretionary rule of *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988).

(Petitioners' Petition for Writ of Certiorari, at page 22 (footnote omitted)).

It is evident, however, that the District Court, in fact, determined that it did not have subject matter jurisdiction under 28 U.S.C. § 1441 of the removed action, or in other words, that removal jurisdiction did not exist under Section 1441.[12] To begin with, the District Court acknowledged that no federal question jurisdiction existed on the face of Respondents' state court complaint. Moreover, recognizing that "determining the truth or falsity of the alleged defamatory statement[s] does not depend on interpreting § 1983 or any other [federal] statute," the District Court further held that Petitioners had failed to demonstrate that federal law was an essential element of

---

[12] The Third Circuit Court of Appeals addressed Petitioners' appeal from the District Court's refusal to grant removal pursuant to the All Writs Act, 28 U.S.C. § 1651, opining:

> Here, however, the Trustees have not demonstrated how removal will support jurisdiction that is already in existence. Nor have they identified the "extraordinary circumstances" necessary to justify removal under the Act. *See In re Agent Orange Product Liability Litig.*, 996 F.2d 1425, 1431 (2d Cir. 1993) (The Act is not a "jurisdictional blank check which [federal courts] may use whenever they deem it advisable."). Accordingly neither will we exercise jurisdiction under § 1651.

Davis v. Glanton, 107 F.3d 1044, 1047 n.4 (3d Cir. 1997). A review of the instant Petition for Writ of Certiorari reveals that Petitioners are apparently not seeking certiorari on the Third Circuit's opinion affirming remand on that basis.

Respondents' state court complaint. *Davis v. Glanton*, 921 F.Supp. 1421, 1424 (E.D.Pa. 1996).

Consequently, similar to this Court's conclusion in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), including this Court's conclusion that the matter should have been remanded since federal jurisdiction did not exist, it is apparent that Respondents' state court complaint for defamation, libel and slander is not based upon a federal cause of action nor a claim which necessarily depends on resolution of a substantial question of federal law. Thus, no federal jurisdiction exists pursuant to Section 1441, and as such, pursuant to well settled law, the District Court's remand to state court is not reviewable on appeal or otherwise.

Therefore, it is plain that none of the cases cited by Petitioners have any relationship to the District Court's order remanding Respondents' purely state court complaint back to its appropriate state court forum for lack of subject matter jurisdiction pursuant to Section 1441.[13] Accordingly, no "split" among the circuit courts of

---

[13] All of the cases cited by Petitioners in their attempt to "create" a conflict among the various circuit courts include cases (1) in which a district court, in its discretion, remanded pendent or supplemental state court claims upon dismissal or resolution of a federal court claim; and (2) in which a district court resolved substantive issues of law prior to remand, *i.e.*, resolution of a forum selection clause, waiver of the right to remove. Thus, none of the cases cited by Petitioners in support of their "conflict among the circuits" contention involved a determination by the District Court that it did not have subject matter jurisdiction under 28 U.S.C. § 1441 as set forth in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

appeals exists; rather, it is evident that without Petitioners' mischaracterization, the law is well established. Petitioners' Petition for Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, and for all of the reasons contained in the opinion of the Third Circuit Court of Appeals affirming the District Court's order, as well as all of the reasons contained in the District Court's order remanding the instant matter to the Pennsylvania state court, this Court should deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

PAUL R. ROSEN
Counsel of Record
LARRY R. WOOD, JR.
SPECTOR GADON & ROSEN, P.C.
1635 Market Street, 7th Floor
Philadelphia, PA 19103
(215) 241-8800

Counsel for Respondents

July 31, 1997

APPENDIX A

KENNETH E. DAVIS; JAMES S. ETTELSON; ALAN C. KESSLER; FRANK LUTZ; JOSEPH M. MANKO; ORA B. PIERCE; JAMES J. PRENDERGAST; BRIAN D. ROSENTHAL; DAVID A. SONENSHEIN; HOWARD L. WEST; GLORIA P. WOLEK; PHYLLIS L. ZEMBLE v. RICHARD GLANTON, Individually and as a Trustee of The Barnes Foundation; NIARA SUDARKASA, Individually and as a Trustee of the Barnes Foundation; SHIRLEY A. JACKSON, Individually and as a Trustee of the Barnes Foundation; CHARLES FRANK, Individually and as a Trustee of the Barnes Foundation, Richard Glanton, Niara Sudarkasa, and Shirley A. Jackson, Appellants

NO. 96-1299

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

1997 U.S. App. LEXIS 6469

April 1, 1997, DATED

PRIOR HISTORY: [*1] (D.C. Civ. No. 96-cv-01800).

Original Opinion of March 3, 1997, Reported at: *1997 U.S. App. LEXIS 3696.*

JUDGES: Present: SLOVITER, Chief Judge. BECKER, STAPLETON, MANSMANN, GREENBERG, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, Circuit Judges.

OPINION BY: Edward R. Becker, Circuit Judge

OPINION: SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available

circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service no [sic] having noted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:
Edward R. Becker
Circuit Judge
DATED: Apr. 1, 1997

APPENDIX B

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

* * *

KENNETH E. DAVIS, et al.,	:	
	:	
-vs-	:	
RICHARD GLANTON, Individually	:	
and as a Trustee of	:	No. 96-03920
The Barnes Foundation,	:	
NIARA SUDARKASA, Individually	:	
and as a Trustee of	:	
The Barnes Foundation,	:	
SHIRLEY A. JACKSON, Individually	:	
and as a Trustee of	:	
the Barnes Foundation,	:	
CHARLES FRANK, Individually	:	
and as a Trustee of	:	
The Barnes Foundation.	:	

* * *

VOLUME II

* * *

Oral deposition of RICHARD GLANTON, ESQ., held at the Montgomery County Courthouse, Norristown, PA 19401, on Wednesday, July 3, 1996, beginning at 10:20 a.m., before Catherine E. Kirkland, Ph.D, a Registered Professional Reporter.

* * *

MAC WISE REALTIME REPORTING, INC.
Architects Building
117 S. 17th Street, Suite 2100
Philadelphia, PA 19103
215.972.1757 FAX: 215.972.1761 800.MAC.6210
E-Mail: macwise@netaxs.com
http://www.netaxs.com macwise

* * *

[p. 157] what's in their minds.

MR. ROSEN: I want to know what this man – that's what I'm looking for – in understanding – and this man is familiar with defamation claims. In making a claim of defamation, I am very interested in the motivations, how you perceive facts, how you draw the distinctions in those facts. Because it all goes to an issue of motivation and intent. I'm allowed to explore these areas.

BY MR. ROSEN:

Q. However, my question to you was what I thought was a very simple one. Which is, in your mind, if somebody is motivated by racism, are they a racist? That's a question. And that, to me, is either a yes or no.

A. Two things. In this deposition, Mr. Rosen, refer to me as Mr. Glanton or Richard, as you prefer – it doesn't matter – and not as "this man."

Secondly, in reponse to your question, with the knowledge of my explanation in terms of how I sort of am trying to work my way to an answer – that is, the previous comment that I [p. 158] just said in response to the question that was initially asked – I don't try to probe

into a person's mind. You do something to me and you do something to me and you're not doing it to somebody else who is the same color as I am, I don't say are you racially motivated or are you a racist. It's irrelevant.

All I'm saying is if you're doing something to me because of – and it's discriminatory, and it's because of my color, I don't care what you are. I know what's happening to me.

So as an African-American, I'm not going to have a treatise written on a racist or racially motivated. All I'm saying is that you are doing X to me, and it's discriminatory and it's wrong. And I don't give a damn why you're doing it. You're doing it, and it's wrong, and it's illegal.

Q. The question I asked you is, if somebody is motivated by racism, do you consider them to be a racist?

A. I can't answer that except to say that if you do something to me and you're not doing it to other

* * *

APPENDIX C

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

* * *

KENNETH E. DAVIS, JAMES S. ETTELSON, ALAN C. KESSLER, FRANK LUTZ, JOSEPH M. MANKO, ORA R. PIERCE, JAMES J. PRENDERGAST, BRIAN D. ROSENTHAL, DAVID A. SONENSHEIN, HOWARD L. WEST, GLORIA P. WOLEK, AND PHYLLIS L. ZEMBLE	:	No. 96-03920
vs.	:	
RICHARD GLANTON, Individually and as a Trustee of The Barnes Foundation,	:	
NIARA SUDARKASA, Individually and as a Trustee of The Barnes Foundation,	:	
SHIRLEY A. JACKSON, Individually and as a Trustee of The Barnes Foundation,	:	
CHARLES FRANK, Individually and as a Trustee of The Barnes Foundation	:	

* * *

ORAL DEPOSITION OF BETH E. YANOFSKY

THURSDAY, JANUARY 16, 1997

* * *

MAC WISE REALTIME REPORTING, INC.
The Architects Building
117 South 17th Street, Suite 2100
Philadelphia, PA 19103
E-Mail: macwise@netaxs.com
http:///www.netaxs.com/-macwise
215.972.1757 FAX: 215.972.1761 1.800.MAC.6210

* * *

[p. 13] any disclosed source relation to Mr. Glanton?

A. No, I do not.

Q. Now I would like to take you, if I can, to an article of November 23, 1995, which has been previously marked during Mr. Glanton's deposition as Glanton 17.

Could you tell me whether or not, in connection with the preparation of this article, you had any conversations with Mr. Glanton?

A. Yes, I did.

Q. And could you tell me, to the best of your recollection, the conversations you had with Mr. Glanton that ended up in any way being reported in this article?

A. Yes.

I called Mr. Glanton over the telephone within a week of when this article was published and in that phone conversation that's what we talked about.

Q. Could you tell me whether or not Mr. Glanton said to you that "the resolution passed by the Lower

Merion board of commissioners at last Wednesday's business meeting was about racism, not public safety, illegal parking, crowded streets [p. 14] or traffic jams?"

A. Yes, he did.

Q. He made that statement to you in a telephone interview?

A. Yes.

Q. And where it says in the first paragraph of the article, " 'it's what we predicted,' said Richard Glanton, Barnes Foundation board of trustees president," did he make that statement to you?

A. Yes, he did.

Q. Now, could you tell me, with respect to "It's what we predicted? – you see that quote?

A. Yes, I do.

Q. Could you tell me what you were talking about?

A. We were talking about the turnout for the opening of The Barnes Foundation.

Q. Meaning the numbers of people that showed up?

A. Yes.

Q. Now, could you tell me anything else that Mr. Glanton said to you with respect to racism involving the commissioners of Lower Merion

* * *

APPENDIX D

VOLUME IV
IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

* * *

KENNETH E. DAVIS, JAMES S. ETTELSON, ALAN C. KESSLER, FRANK LUTZ, JOSEPH M. MANKO, ORA R. PIERCE, JAMES J. PRENDERGAST, BRIAN D. ROSENTHAL, DAVID A. SONENSHEIN, HOWARD L. WEST, GLORIA P. WOLEK, AND PHYLLIS L. ZEMBLE	:	NO. 96-03920
vs.	:	
RICHARD GLANTON, Individually and as a Trustee of The Barnes Foundation,	:	
NIARA SUDARKASA, Individually and as a Trustee of The Barnes Foundation,	:	
SHIRLEY A. JACKSON, Individually and as a Trustee of The Barnes Foundation,	:	
CHARLES FRANK, Individually and as a Trustee of The Barnes Foundation	:	

* * *

CONTINUED ORAL DEPOSITION

OF RICHARD H. GLANTON, ESQUIRE

THURSDAY, NOVEMBER 7, 1996

MAC WISE REALTIME REPORTING, INC.
The Architects Building
117 South 17th Street, Suite 2100
Philadelphia, PA 19103
E-mail: macwise@netaxs.com
http:///www.netaxs.com/-macwise
215.972.1757 FAX: 215.972.1761 1.800.MAC.6210

* * *

[p. 815] which is an article you produced in connection with this discovery in response to the court order. It was marked as 2A as part of the production of documents when we were –

MR. ELLIOTT: You want to mark it?

MR. ROSEN: It has been marked as 2A previously.

BY MR. ROSEN:

Q. Mr. Glanton, may I walk behind you? Because I can't see the article.

A. Sure. I feel comfortable with you behind me.

Q. I have placed in front of you Exhibit 2A.

This is the article that you talked about that pains you?

A. It is the smoking gun.

Q. This is an article dated – it indicates Main Line Times, March 7, 1996.

It says, "Asked what township officials hope to gain from the lawsuit, Philadelphia attorney Paul Rosen said, 'To stop this man from his wanton and careless use of the race card.

[p. 816] " 'We want to pain him and make him dig deep into his own pocket so every time he wants to use race card in future, he'll think twice.' "

Is that what you're talking about?

A. That's part of what I'm talking about, basically this venal, mean sort of like let's sic the bloodhounds on this black guy.

Q. Is this a racist comment?

A. Oh, yes, definitely.

Q. I made a racist comment here?

A. Yes.

Q. According to this, I am a racist?

A. Well, no, I didn't say that.

MR. ELLIOTT: Mr. Glanton, I'm going to object to that. That is something that we have gone through again and again.

MR. ROSEN: I don't mind.

BY MR. ROSEN:

Q. I mean, I'm trying to find out. It is quoting me, and my quote is racist, as far as you –

A. It is linking me to the aftermath of the reaction of the O. J. Simpson case by saying [p. 817] "race card."

That was the first time I had ever heard that term used.

Q. First time you ever heard the term "race card" used was in the O. J. Simpson trial?

A. That's correct, and what you're linking it to.

Q. Are you telling me that my statement right here is an indication that I'm a racist?

A. No.

I'm saying this comment is designed to conjure up racial animosities and to make people resent the fact that people are opposed. It is sort of like the jelly beans. They are always always saying – did you read the Texaco article? Have you been in America for the last three days?

Q. Have you?

A. I'm just – it is the same thing.

Q. Let me see if I can deal with the issues. All right?

A. The black jelly beans stick to the bottom.

Q. Let me see if I can deal with the [p. 818] issues, okay, and let's deal with them.

A. Okay.

Q. We'll deal with this case, if we can, not a class action suit against Texaco by people claiming they have not been treated fairly as class.

A. Same thing.

Q. Are you attributing my statement to the statements that were made in the Texaco case?

A. I am saying it is sort of the same kind of cryptic comment. Race card, it is coded.

Q. Are you saying that the statements about the jelly beans sticking to the bottom of the bag that came out in the paper about the executives in Texaco is the same as me?

A. This is designed to make people hate me because of race because you are saying that I'm always crying race.

Q. Aren't you?

A. No.

Q. You're not?

A. No, I am not, not unless a racist is on my foot.

Q. So that the only time you have ever [p. 819] said the word racist –

A. When I have been treated in a racist manner.

Q. Now, don't you admit that you say that a lot?

A. I don't say it until I'm treated that way.

Q. Isn't –

A. I have the right to speak my voice.

Q. Isn't it true that almost every time that you're accused of anything you don't agree with, you use the race card?

A. No.

Q. It isn't?

A. No.

Q. Can you tell me one instance in which you have been accused of something you didn't play the race card?

A. I would rather you ask the questions?

Q. Can you tell me one? Tell me one.

A. One instance that I have been accused of something?

Q. That you did not accuse the other [p. 820] person of racism –

A. I haven't ever been accused of anything criminally.

Never.

Q. I didn't say criminally.

Can you tell me one instance at all that someone disagreed with you vehemently on a subject that you didn't claim that their disagreement with you was based upon race?

Can you tell me one?

A. I hope you don't deny that there was a civil war in America.

Q. Can you tell me one?

I'll just sit here.

One.

A. Yes.

Q. Tell me one.

A. Just now. I mean, you're saying all these things, and I'm not accusing you of being a racist.

Q. You just did.

A. No.

MR. ELLIOTT: That was in the article.

[p. 821] BY MR. ROSEN:

Q. Can you think of anyone other than the question I just asked you?

A. Not offhand.

Q. Now, are you aware of the concept of punitive damages?

A. Yes, I'm aware.

Q. Read out loud the article.

A. Where?

Q. Continue. Right after it says " 'dig deep into his own pocket so every time he wants to use race card in the future, he'll think twice.' "

Read the continuing quote.

A. " 'We accept whatever the jury decides to" – blank – " 'should be' " – " 'the fee should be,' " I suppose. " 'They just want him to stop hurting people and they want their reputations clean. We want punitive damages that will come out of his personal pocket, not his insurance company,' Rosen said."

Q. Now, you understand the concept of punitive damages is to inflict damages upon somebody so that

they feel and dig deep into their pockets so they don't do something again; isn't [p. 822] that correct?

A. Yes.

Q. And isn't that what that article is saying?

A. No.

Q. Isn't it saying –

A. It is a separate paragraph.

Q. It is the same quote.

A. Separate paragraph, though. It is a separate – it is a broken idea.

Q. It doesn't read the same?

A. No.

Q. Now –

A. This is a deliberate, despicable, viper-like strike at me using race to conjure up the image that I'm out there saying every time some vigilante Ku Klux Klan sticks up a burning cross in my face, and if I say, Oh, gee, these people might be prejudiced, you're saying, There he goes, hollering the race card.

That's exactly what you're doing.

Q. You read the complaint in this case?

A. Sure, I have.

Q. Do you see anything in the complaint.

* * *